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In the Supreme Court of the United States

OCTOBER TERM, 1995

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ROBERT F. LUNDY

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether 26 U.S.C. 6512(b) (3) (B) bars a taxpayer from obtaining a refund of an overpayment of income taxes in a Tax Court case when he (i) failed to file a return for more than two years after the return was due and the taxes in issue were paid and (ii) then filed his return only after the Commissioner issued the notice of deficiency that led to the Tax Court litigation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 45 F.3d 856. The opinion of the Tax Court (Pet. App. 30a-52a) is reported at 65 T.C.M. (CCH) 3011.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1995. The petition for a writ of certiorari was filed on April 28, 1995, and was granted on May 30, 1995 (115 S. Ct. 2244). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 6511 (26 U.S.C.) provides, in relevant part:

(1)

(a) Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. * * *

* * * * *

(b)(2)(A) If the claim was filed by the taxpayer during the 3-year period prescribed in subsection (a), the amount of the credit or refund shall not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing the return. * * *

* * * * *

(b)(2)(B) If the claim was not filed within such 3-year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim.

* * * * *

2. Section 6512 (26 U.S.C.) provides, in relevant part:

(b)(1) Except as provided by paragraph (3) and by section 7463, if the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of income tax for the same taxable year, * * * the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has

become final, be credited or refunded to the taxpayer.

* * * * *

(b)(3) No such credit or refund shall be allowed or made of any portion of the tax unless the Tax Court determines as part of its decision that such portion was paid—

* * * * *

(B) within the period which would be applicable under section 6511(b)(2), (c), or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment * * *.

3. Section 6513 (26 U.S.C.) provides, in relevant part:

(b)(1) Any tax actually deducted and withheld at the source during any calendar year under chapter 24 shall, in respect of the recipient of the income, be deemed to have been paid by him on the 15th day of the fourth month following the close of his taxable year with respect to which such tax is allowable as a credit under section 31.

STATEMENT

1. Although federal income taxes were withheld from respondent's wages during 1987, he failed to file an income tax return for that year when it was due, on April 15, 1988. More than two years later, on September 26, 1990, in the absence of any return from respondent, the Commissioner of Internal Revenue mailed respondent a notice of deficiency of \$13,806 in his income taxes for 1987. Three months later, on December 22, 1990, respondent mailed a joint income tax return for 1987 with his wife. That untimely return asserted a \$3,537 overpayment of

their joint income tax liability for 1987 (Pet. App. 2a).

2. a. On December 28, 1990, respondent sought a redetermination in the Tax Court of the deficiency asserted by the Commissioner in his 1987 income taxes. Respondent also sought a further determination that he had overpaid his 1987 taxes by \$3,537. Upon review of the information contained in respondent's untimely return, the Commissioner filed an amended answer that acknowledged that a deficiency did not exist in respondent's 1987 taxes and that respondent had, in fact, made an overpayment of \$3,537 in the taxes that he owed for that year (Pet. App. 2a).

Following these stipulations, the only issue remaining in the Tax Court was whether respondent was entitled to a refund of the overpayment. The Commissioner contended that a refund of the overpayment was barred by the provisions of Sections 6511 and 6512 of the Internal Revenue Code, 26 U.S.C. 6511, 6512 (Pet. App. 3a).

b. The Tax Court agreed with the Commissioner that Sections 6511 and 6512 bar any recovery of respondent's refund claim (Pet. App. 30a-52a). The court noted that Section 6512(b)(3)(B) limits the amount of any overpayment that may be refunded in a Tax Court case to the amount that would have been refundable under Section 6511(b)(2) if a claim for refund had been filed "on the date of the mailing of the notice of deficiency" (Pet. App. 37a-38a, quoting 26 U.S.C. 6512(b)(3)(B)). The court stated that Section 6512(b)(3)(B) "directs us to focus on the situation as it would have been on a specified date—the date of the mailing of the notice of deficiency. Thus, this provision requires us to 'take a snapshot' of the situation" as of the date of the mailing of the notice of deficiency (Pet. App. 38a). Be-

cause, as of the date the notice of deficiency was mailed, respondent had not filed a return for his 1987 taxes, the amount of the overpayment of tax that was refundable to him was limited to the amount of tax he had paid within the two-year period immediately preceding the date that the notice of deficiency was mailed (*id.* at 39a, citing 26 U.S.C. 6511(b)(2)(B)). Since respondent had not paid any of the taxes involved in this case during the two-year period preceding the mailing of the notice of deficiency, the court concluded that Section 6512(b)(3)(B) bars any refund of respondent's overpayment (Pet. App. 39).

The Tax Court rejected (Pet. App. 51a) respondent's contention that the government should be estopped from applying the two-year limitation of Section 6512(b)(3)(B):¹

¹ The Tax Court made the following findings concerning the late filing of respondent's 1987 tax return (Pet. App. 32a-33a):

[The taxpayer] timely requested an automatic extension of time to file his tax return for 1987; the filing period was extended to August 15, 1988. From 1988 through 1990, [the taxpayer] had health problems, was hospitalized after a car accident, dealt with various family problems, and was involved in a divorce. On June 4, 1990, [the government] sent a letter to [the taxpayer] stating that if the [government] did not hear from [the taxpayer] within 30 days, then [the government] would prepare a substitute return for 1987 for [the taxpayer]. In response, on July 3, 1990, [the taxpayer] wrote to [the government] stating that he had not yet filed his 1987 income tax return, but that he would "file within the three year period to claim [his] refund". From June 1988 until September 1990, [the government] contacted [the taxpayer] twice about his 1987 Federal income tax

[Respondent] contends that he was misled by [the government] because he relied on * * * representations that a taxpayer has 3 years from the time the tax was paid to file a return or claim for credit or refund. [Respondent] does not claim that any specific type of estoppel should be applied to [the government]. However, his contentions are similar to the equitable estoppel argument which was rejected in *Dillard v. Commissioner*, T.C. Memo. 1992-126, and we also reject it in the instant case. * * * [Respondent] testified that [the government's] employees urged him to file his 1987 tax return as soon as possible. As noted in Rev. Rul. 57-354, [1957-2 C.B. 913], which [respondent] relies on for his administrative practice argument, for at least a generation [the government] has warned that if a taxpayer files a claim for credit or refund before filing a tax return for that period, then the taxpayer may lose an opportunity to get the credit or refund.

Noting that the limitation on refunds of overpayments in Tax Court that this case involves "is specifically provided by statute," the court concluded that "[t]here is no basis for an estoppel against [the Commissioner] in the instant case. See *Miller v. United States*, 949 F.2d 708, 712-713 (4th Cir. 1991)." Pet. App. 51a.

return. Each time [the government] asked [the taxpayer] to file his tax return "as soon as possible." On these occasions, [the government] did not tell [the taxpayer] that he did not have to file his 1987 tax return for 3 years.

The court stated that "the statute is intricate and precise" in denying a refund in the context of this case (Pet. App. 51a). The court concluded that, even if the statute may appear harsh to a person such as respondent who failed to file his return in a timely manner, the statute must be applied "as the Congress enacted it" (*id.* at 51a-52a).

3. The court of appeals reversed (Pet. App. 1a-29a). In doing so, the court rejected the decisions of several other circuits that had upheld the Tax Court's analysis of these statutory provisions (*id.* at 21a-22a, citing, *e.g.*, *Richards v. Commissioner*, 37 F.3d 587 (10th Cir. 1994), petition for cert. pending, No. 94-1537).² The court of appeals held in the present case (Pet. App. 12a) that, notwithstanding the plain language of the statute, Section 6512(b)(3)(B) does not require the Tax Court to test the taxpayer's claim for refund as if it were filed on the date that the notice of deficiency was issued. In reaching that conclusion, the court of appeals relied on what it regarded as evidence in "the legislative history of

² See, *e.g.*, *Davison v. Commissioner*, 9 F.3d 1538 (2d Cir. 1993) (Table) (unpub.), aff'g 64 T.C.M. (CCH) 1517 (1992); *Allen v. Commissioner*, 23 F.3d 406 (6th Cir. 1994) (Table) (unpub.), aff'g 99 T.C. 475 (1992); *Galuska v. Commissioner*, 5 F.3d 195 (7th Cir. 1993). The court of appeals also expressly disagreed (Pet. App. 22a, 25a-28a) with the Ninth Circuit's analysis of Section 6511 in *Miller v. United States*, 38 F.3d 473 (1994). The analysis of the Ninth Circuit in *Miller* led directly to that court's decision in *Rossman v. Commissioner*, 46 F.3d 1144 (1995) (Table) (unpub.), aff'g 66 T.C.M. (CCH) 336 (1993), petition for cert. pending, No. 94-1747, which held that Section 6512(b)(3)(B) barred a refund of the overpayment made by the taxpayer in that case. The decision in *Rossman* also directly conflicts with the decision of the court of appeals in the present case.

§ 6512 [that] indicates that Congress intended a taxpayer who filed a claim for refund within three years of filing a tax return to have a three-year refund period that runs from the date of the mailing of the notice of deficiency" (Pet. App. 17a). Based on this reading of the legislative history, the court stated (*ibid.*):

We interpret § 6512(b)(3)(B) to provide for a three-year refund period where the taxpayer files a claim for refund in Tax Court within three years of filing his tax return and to commence the refund period from the date of the mailing of the notice of deficiency.

The court of appeals also sought to rely on what it perceived to be the potential anomaly that respondent "would have received his refund if he had filed his claim for refund in a United States district court or the United States Claims Court" (Pet. App. 10a). In making this assertion, the court assumed that a return filed by a taxpayer more than two years after the return was due would permit a subsequent refund claim to invoke the three-year refund period of Section 6511(b)(2)(A). The court recognized (Pet. App. 27a) that its assumption that the same taxpayer would fare differently in a refund suit in the Court of Federal Claims or in federal district court than in the Tax Court had been squarely rejected by the Ninth Circuit in *Miller v. United States*, 38 F.3d 473, 475-476 (1994). In *Miller*, the court ruled that, when a return is not filed within "two years after payment," the taxpayer's claim—whether brought in the Court of Federal Claims, federal district court or in the Tax Court—is barred by Section 6511(a). 38 F.3d at 476. The court explained in *Miller* that an

untimely return filed more than two years after the date of payment "cannot resurrect the three-year period" (*id.* at 475):

If the clock were to run only from the filing of the return, no claim would ever be barred as long as the return was not filed. * * * The point at which one must determine whether a return has or has not been filed, for purposes of [Section 6511(a)], must be two years after payment. Otherwise, no claim could ever finally be barred by the two-year-after-payment clause because the taxpayer could at any time file a return and have three more years to assert the claim.

In the present case, however, the court of appeals expressly disagreed with the reasoning of *Miller*. The court concluded instead that, "under § 6511(a), [a taxpayer] has three years from the date of the filing of even a delinquent tax return to file a claim for refund" (Pet. App. 27a). The court did not attempt to explain what, if any, role it would attribute to the two-year limit on refunds under Section 6511(a) that was central to the court's decision in *Miller*.

The court of appeals summarized its holding in the present case as follows (Pet. App. 12a):

We hold that the Tax Court when applying the limitation provision of § 6511(b)(2) in light of § 6512(b)(3)(B), should substitute the date of the mailing of the notice of deficiency for the date on which the taxpayer filed the claim for refund, but only for the purpose of determining the benchmark date for measuring the limitation period and not for the purpose of determining whether the two-year or three-year limitation period applies. In other words, we interpret § 6512(b)(3)(B) as merely shifting back the

benchmark date of the refund period from the date on which the taxpayer filed the claim for refund to the date on which the IRS mailed the notice of deficiency; § 6512(b)(3)(B) does not change the length of the refund period from what would have been applied under § 6511(b)(2).

Because the entire amount of the overpayment involved in this case had been made within three years of the mailing date of the notice of deficiency, the court concluded that respondent was entitled to a refund of the overpayment under Section 6512(b)(3)(B) (Pet. App. 13a).

SUMMARY OF ARGUMENT

1. When a taxpayer petitions the Tax Court for review of a deficiency asserted by the Commissioner, Section 6512(b)(1) of the Internal Revenue Code authorizes the Tax Court not only to review the claimed deficiency but also to determine the amount of any overpayment that the taxpayer may have made. 26 U.S.C. 6512(b)(1). Section 6512(b)(3)(B), however, limits the amount of any refund of an overpayment determined by the Tax Court to the amount that would have been refundable under Section 6511(b)(2) if a claim for refund had been filed by the taxpayer "on the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)).

Section 6511(b)(2)—which Section 6512(b)(3)(B) incorporates by reference—limits the amount of any refund to the amount of the disputed taxes that the taxpayer paid (i) within the two-year period prior to the date of the refund claim if, at the time of the refund claim, "no return was filed by the taxpayer" (26 U.S.C. 6511(a), incorporated by refer-

ence in 26 U.S.C. 6511(b)(2)(B)) or (ii) within the three-year period prior to the date of the refund claim if the refund claim was made "within 3 years from the time the return was filed" (26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(A)). Section 6512(b)(3)(B) incorporates these refund limitations into Tax Court overpayment determinations and specifies that they are to be applied by assuming that a claim for refund was filed by the taxpayer "on the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)).

In the present case, respondent had failed to file any return for 1987 by the time the notice of deficiency was mailed by the Commissioner in 1990. Accordingly, on the date that the notice of deficiency was issued and the statutorily imputed refund claim arose under Section 6512(b)(3)(B), "no return was filed by the taxpayer" (26 U.S.C. 6511(a)). As the result, the refund that respondent may obtain for his overpayment of tax for 1987 is limited to the amount of tax that he paid during the two-year period immediately preceding the imputed refund claim. 26 U.S.C. 6511(b)(2)(B). Because no portion of the tax at issue in this case was paid within the two-year period preceding the mailing of the notice of deficiency, respondent was barred by the statutory text from obtaining any refund of his overpayment, as the Tax Court correctly held.

2. The court of appeals expressly disregarded the plain language of Section 6512(b)(3)(B) in order to achieve a result that the court concluded was supported by its legislative history. In the court's view, the history of the statute supports the proposition that Congress intended a taxpayer who challenges a

tax in Tax Court to be able to obtain a refund for the amount of any overpayment made within three years of the date that the notice of deficiency was mailed.

The extraordinarily sparse history cited by the court of appeals falls far short of supporting the court's speculations concerning legislative intent and, in any event, does not provide a basis for flouting the direct command of the plain language of Section 6512(b)(3)(B). By disregarding the text of the statute, the court of appeals reached a conclusion that conflicts with a prior decision of that court and also with decisions of the Second, Sixth, Seventh, Ninth and Tenth Circuits.

3. The court of appeals found additional support for its decision in the potential anomaly that respondent may not have been barred from recovery if he had elected to bring suit for a refund in federal district court instead of challenging the tax in the Tax Court. But Congress has provided numerous distinctions between district court actions and Tax Court proceedings. Even if the court of appeals were correct in assuming that respondent would have fared better had he elected to proceed in district court, that would not provide a valid basis for ignoring the plain language of Section 6512(b)(3)(B). Moreover, as the Ninth Circuit explained in *Miller v. United States*, *supra*, the text of the statute supports a conclusion that the presumed anomaly may not exist—that a taxpayer such as respondent who fails to file a return for more than two years after it is due may also be ineligible to receive a refund of his overpayment in a suit brought in district court.

ARGUMENT

SECTION 6512(b)(3)(B) OF THE INTERNAL REVENUE CODE BARS A TAXPAYER FROM OBTAINING A REFUND OF AN OVERPAYMENT OF INCOME TAXES IN A TAX COURT CASE WHEN THE TAXPAYER (i) FAILED TO FILE A RETURN FOR MORE THAN TWO YEARS AFTER THE RETURN WAS DUE AND THE TAXES IN ISSUE WERE PAID AND (ii) THEN FILED HIS RETURN ONLY AFTER THE COMMISSIONER ISSUED THE NOTICE OF DEFICIENCY THAT LED TO THE TAX COURT LITIGATION

The Tax Court is a court of limited jurisdiction. *Commissioner v. McCoy*, 484 U.S. 3, 7 (1987); *Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. 418, 420 (1943). This case concerns the limits on the jurisdiction of the Tax Court to award refunds for overpayments of tax.

1. *The Governing Statutory Provisions*

The statutory limits on refunds in Tax Court proceedings (in Section 6512 of the Internal Revenue Code) are derived from, but not identical to, the limits that apply to refund suits in federal district courts (in Section 6511 of the Code). A description of the latter provisions is necessary for an explanation of the former.

a. In separate, intertwined subsections of Section 6511, Congress has provided both a statute of limitations for claims for refund and a limit on the amount of a refund that may be recovered under timely filed claims. Section 6511(a) specifies that any claim for refund must be submitted to the Commissioner (26 U.S.C. 6511(a))

within 3 years from the time the return was filed or 2 years from the time the tax was paid, which-

ever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

If a refund claim is submitted out of time under this provision, it must be disallowed. 26 U.S.C. 6511(b)(1).

If a refund claim has been submitted within the time permitted by Section 6511(a), Section 6511(b)(2) then provides limits on the *amount* of any refund that may be allowed. The subparagraphs of Section 6511(b)(2) are sometimes referred to as the "look-back" rules. See, *e.g.*, *Allen v. Commissioner*, 99 T.C. 475, 477 (1992), *aff'd*, 23 F.3d 406 (6th Cir. 1994) (Table) (unpub.). They limit the amount of any refund of an overpayment of tax to the amount of the taxes that the taxpayer paid

(i) within the *three-year period* prior to the date of the refund claim if the refund claim was made "within 3 years from the time the return was filed" (26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(A)); or

(ii) within the *two-year period* prior to the date of the refund claim if, (I) at the time of the refund claim, "no return was filed by the taxpayer" or (II) the refund claim was filed more than three years after the return but within two years "from the time the tax was paid" (26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(B)).

See *Richards v. Commissioner*, 37 F.3d 587, 589 (10th Cir. 1994); *Galuska v. Commissioner*, 5 F.3d 195, 196 (7th Cir. 1993).

b. The provisions of Section 6511 are not, by their terms, directly applicable to Tax Court proceedings.

Indeed, the jurisdiction of the Tax Court may not be invoked solely for the purpose of obtaining a refund. Instead, the basic jurisdiction of the Tax Court is to review deficiencies in tax that the Commissioner has asserted.³ 26 U.S.C. 6213(a). In proceedings commenced by a taxpayer to review an asserted deficiency, however, the Tax Court has been given jurisdiction not only to redetermine the amount of the deficiency but also to determine the amount of any overpayment that the taxpayer may have made. 26 U.S.C. 6512(b)(1). An overpayment determined by the Tax Court in such a proceeding is to be credited or refunded to the taxpayer subject to the express limitations of Section 6512(b)(3) of the Code. See 26 U.S.C. 6512(b)(1).⁴

³ A "deficiency" in tax is ordinarily the amount by which the tax determined to be due by the Commissioner exceeds the amount reported by the taxpayer on the return. 26 U.S.C. 6211(a)(1). When the Commissioner determines a "deficiency" because the taxpayer has filed no return or has underreported the taxes due on his return, the Commissioner may not proceed to assessment and collection of the outstanding tax until notice of the deficiency is issued to the taxpayer. 26 U.S.C. 6212(a). If, within 90 days after issuance of the notice of deficiency, the taxpayer files a petition for review of the deficiency in Tax Court, the Commissioner may not proceed to assessment and collection until the judgment of the Tax Court becomes final. 26 U.S.C. 6213(a). During the period of the Tax Court litigation (and for 60 days thereafter), the three-year statute of limitations on assessment (that commences upon the filing of the return) is tolled. See 26 U.S.C. 6501, 6503(a)(1).

⁴ Beginning in 1928, Congress enacted a series of provisions that conferred jurisdiction on the Tax Court to determine the amount of overpayments. See, *e.g.*, Revenue Act of 1928, ch. 852, § 322, 45 Stat. 861; Revenue Act of 1936, ch. 690, § 322, 49 Stat. 1731; Revenue Act of 1942, ch. 619, § 169, 56 Stat.

Section 6512(b)(3)(B) limits the amount of any refund of an overpayment determined in a Tax Court case to the amount that would have been refundable under Section 6511(b)(2) if a claim for refund had been filed by the taxpayer "on the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)).⁵ Thus, under Section 6512(b)(3)(B), the refund limitations of Section 6511(b)(2) are incorpo-

876; 26 U.S.C. 6511, 6512 (Supp. II 1954). See also *Jones v. Liberty Glass Co.*, 332 U.S. 524, 527-531 (1947). Even though these provisions authorized the Tax Court to determine an overpayment, the court was not initially given "power to order a refund or credit should it find that there has been an overpayment" (*Commissioner v. Gooch Milling & Elevator Co.*, 320 U.S. at 420). Under Section 6512(b)(2) of the Code, however, the Tax Court is now authorized "to order the refund of such overpayment and interest" if, after the decision of the Tax Court becomes final, the Secretary fails to refund the overpayment. 26 U.S.C. 6512(b)(2).

⁵ Paragraph (3) of Section 6512(b) has three subparagraphs. Section 6512(b)(3)(B) is the one applicable to this case; Section 6512(b)(3)(A) does not apply because no payments were made by respondent after the notice of deficiency was mailed; Section 6512(b)(3)(C) does not apply because no claim for refund was filed by respondent before the notice of deficiency was mailed. See 26 U.S.C. 6512(b)(3)(A)-(C).

Section 6512(b)(3)(B) incorporates by reference three limitations provisions. See 26 U.S.C. 6512(b)(3)(B). Only one of those provisions (Section 6511(b)(2)) is applicable to the present case. Sections 6511(c) and (d), which are also incorporated by reference in Section 6512(b)(3)(B), are inapplicable because Section 6511(c) applies only when the time for assessing a tax has been extended by agreement and Section 6511(d) applies only to specified types of claims—such as bad debts, worthless securities, net operating losses, and certain credit carrybacks—that the present case does not involve. See 26 U.S.C. 6511(c) and (d) (1988 & Supp. V 1993).

rated into Tax Court overpayment determinations and are to be applied by assuming that a claim for refund was filed by the taxpayer "on the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)). See *Galuska v. Commissioner*, 5 F.3d at 196; Pet. App. 38a.

2. Application of the Statutory Provisions to This Case

In the present case, when the notice of deficiency was issued by the Commissioner in September 1990, respondent had not filed any return for his 1987 tax year (Pet. App. 33a).⁶ Thus, on the date that the notice of deficiency was issued and the statutorily imputed refund claim arose under Section 6512(b)(3)(B), "no return was filed by the taxpayer" (26 U.S.C. 6511(a)). The refund that respondent may obtain for his overpayment of tax for 1987 is therefore limited to the amount of tax that he paid during the two-year period immediately preceding the filing of the claim for refund. 26 U.S.C. 6511(b)(2)(B), incorporated by reference in 26 U.S.C. 6512(b)(3)(B).

The Seventh Circuit explained the operation of these statutory provisions in *Galuska v. Commissioner*, 5 F.3d at 196:

⁶ Three months after the notice of deficiency was issued, respondent filed an untimely return for his 1987 tax year and sought review of the deficiency in the Tax Court in December 1990. The belated return provided a sufficient basis for the determination of respondent's correct liability and the existence of an overpayment was then conceded by the Commissioner in the Tax Court case (Pet. App. 33a). Because the existence of an overpayment was conceded, the amount of the refund to which respondent is entitled turns solely on the correct application of the refund limitations contained in Section 6512(b)(3).

Here, by virtue of Section 6512(b)(3)(B), Galuska is deemed to have filed his claim for refund on April 12, 1990, which was the date the notice of deficiency was mailed to him. At that time he had filed no tax return for 1986. Consequently, his deemed claim for refund was not filed within the 3-year period prescribed by Section 6511(a) because it states that if no return is filed, the 2-year period prescribed therein is applicable. Therefore the look-back period is the 2-year period prescribed by Section 6511(b)(2)(B). Galuska paid no portion of the tax within that period so that Section 6512(b)(3)(B) precludes any refund of his overpayment, as the Tax Court held. At least twelve other Tax Court cases are in accord, and we discovered no case that is *contra*.

The Tenth Circuit reached the same conclusion in *Richards v. Commissioner*, 37 F.3d at 589:

It is undisputed that in tax court, Ms. Richards' claim was deemed filed on the date she received her notice of deficiency, October 22, 1990, although her return was filed on January 23, 1991. As a result, her claim was not filed "within 3 years from the time the return was filed." 26 U.S.C.A. § 6511(a) (emphasis added). The ordinary understanding of the words "from the time" implies that the taxpayer must file the return prior to filing the claim in order to benefit from the three-year refund period. Ms. Richards' return, however, was filed on January 23, 1991, after the date her claim was deemed filed in tax court. Therefore, she cannot avail herself of the three-year refund period under § 6511(b)(2)(A), and she is necessarily limited to the two-year refund period under § 6511(b)(2)(B).

See also *Anderson v. Commissioner*, 74 A.F.T.R.2d ¶ 94-6222, 94-6223 (4th Cir. 1994) ("Where, as here, the taxpayer did not file a return within three years preceding the claim for a refund of tax, section 6511(b)(2)(B) provides that the applicable limit on the amount of credit or refund is the 'portion of the tax paid during the 2 years immediately preceding the filing of the claim'");⁷ *Kartrude v. Commissioner*,

⁷ The court of appeals attempted to reconcile its decision in this case with the prior decision of the same circuit in *Anderson v. Commissioner*, *supra* (Pet. App. 28a-29a). In *Anderson*, the Fourth Circuit (in an unpublished but detailed opinion) followed the statutory analysis of the Seventh Circuit in *Galuska v. Commissioner*, *supra*, in holding that taxpayers who had not filed a return before the notice of deficiency was issued were barred by Section 6512(b)(3)(B) from obtaining a refund in Tax Court of any portion of their overpayment paid more than two years before the notice of deficiency was issued. The Fourth Circuit panel in the present case purported to distinguish *Anderson* on the ground that the taxpayers in *Anderson* did not file their tax returns until after they had filed their Tax Court petition while respondent in the present case mailed his tax return a few days before he filed his Tax Court petition (Pet. App. 28a-29a). The court of appeals did not explain how the factual distinction it describes—which is unrelated to any of the operative statutory terms—would make a difference in applying Section 6512(b)(3)(B).

The critical fact in applying Section 6512(b)(3)(B) in both the present case and *Anderson* is that, as of the date that the notice of deficiency was mailed to the taxpayer, "no return was filed by the taxpayer" (26 U.S.C. 6511(a), incorporated by reference in 26 U.S.C. 6511(b)(2)(B), incorporated by reference in 26 U.S.C. 6512(b)(3)(B)). As the result, "the amount of the credit or refund shall not exceed the portion of the tax paid during the 2 years immediately preceding the filing of the claim" (26 U.S.C. 6511(b)(2)(B)), which date is imputed by statute (in Tax Court cases) to be

925 F.2d 1379, 1385 (11th Cir. 1991); *Allen v. Commissioner*, 99 T.C. at 479.

The taxes that were withheld from the income earned by respondent during 1987 are deemed by statute to have been paid on April 15, 1988, the date when his tax return for that year was due. See 26 U.S.C. 6513(b)(1). None of the taxes at issue in this case were paid by respondent within the two-year period that preceded the issuance of the notice of deficiency on September 26, 1990 (the date of the statutorily imputed refund claim under Section 6512(b)(3)(B)). Because no portion of the tax at issue in this case was paid within the two-year period preceding the mailing of the notice of deficiency, respondent was barred from obtaining any refund of his overpayment, as the Tax Court correctly held (Pet. App. 39a). Accord, e.g., *Galuska v. Commissioner*, 5 F.3d at 196 & n.2 (citing cases); *Richards v. Commissioner*, 37 F.3d at 589.

3. Limited Waivers of Sovereign Immunity Are to Be Strictly Applied in Accordance With Their Terms

Section 6512(b) confers a limited jurisdiction on the Tax Court to award refunds and represents a limited waiver of the sovereign immunity of the United States. Statutes waiving the immunity of the United States are to be interpreted narrowly in accordance with their terms and any ambiguity is to be resolved "in favor of immunity." *United States v. Williams*, 115 S. Ct. 1611, 1616 (1995), citing *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992).⁸ It is exclusively the province of Congress

"the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)).

⁸ The United States is immune from suit without its consent. The terms of its consent define the jurisdiction and

to decide when, and under what conditions, the sovereign immunity of the United States is to be waived, and "this Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman v. Nakshian*, 453 U.S. 156, 161 (1981), quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957).

Obviously, statutes that limit waivers of sovereign immunity may operate to deny a litigant the right to present an otherwise valid claim for recovery against the government. Recognizing that it is the "very purpose" of such statutes to "make it impossible to enforce what were otherwise perfectly valid claims" (*United States v. Kubric*, 444 U.S. 111, 125 (1979)), the Court has admonished that statutory limitations on recoveries against the government "must be strictly adhered to by the judiciary" (*Kavanagh v. Noble*, 332 U.S. 535, 539 (1947)).

Prior to the decision of the court of appeals in the present case, the courts had consistently followed this Court's admonition and "strictly adhered" to the plain language of Section 6512(b)(3)(B). These courts uniformly concluded that if "no return was filed by the taxpayer" (26 U.S.C. 6511(a)) before the notice of deficiency was issued by the Commissioner, the taxpayer may recover in a Tax Court case only that

authority of the courts. *United States v. Dalm*, 494 U.S. 596, 608 (1990); *United States v. Alabama*, 313 U.S. 274, 282 (1941). Statutes limiting suits against the United States "constitute[] a condition on the waiver of sovereign immunity" and "define the extent of the court's jurisdiction" over such an action. *United States v. Mottaz*, 476 U.S. 834, 841 (1986). See also *Block v. North Dakota*, 461 U.S. 273, 287 (1983).

portion of the overpayment that he paid within the two-year period preceding the notice (26 U.S.C. 6512(b)(3)(B)), incorporating 26 U.S.C. 6511(b)(2)(B)). See *Galuska v. Commissioner*, 5 F.3d at 196 & n.2; *Richards v. Commissioner*, 37 F.3d at 589 & n.6. See also *Allen v. Commissioner*, 23 F.3d 406 (6th Cir. 1994) (Table) (unpub.); *Davison v. Commissioner*, 9 F.3d 1538 (2d Cir. 1993) (Table) (unpub.), aff'g 64 T.C.M. (CCH) 1517 (1992); *Anderson v. Commissioner*, 36 F.3d 1091 (4th Cir. 1994) (Table) (unpub.), reported at 74 A.F.T.R.2d ¶ 94-6222, aff'g 66 T.C.M. (CCH) 4 (1993).

4. *The Court of Appeals Disregarded the Plain Language of the Statute*

The court of appeals expressly rejected the consistent reasoning of these other courts. The court held instead that (Pet. App. 12a) (emphasis added)

the Tax Court, when applying the limitation provision of § 6511(b)(2) in light of § 6512(b)(3)(B), should substitute the date of the filing of the notice of deficiency for the date on which the taxpayer filed the claim for refund, but *only* for the purpose of determining the benchmark date for measuring the limitation period and *not* for the purpose of determining whether the two-year or three-year limitation period applies.

The court identified no textual basis in the statute for this holding. Instead, the court described four objections that it had with the reasoning of the courts that had reached a contrary interpretation.

a. The court of appeals first took issue with the Tax Court's use of the phrase "'deemed' claim for refund" (Pet. App. 9a) to describe the statutorily

imputed refund claim that arises "on the date of the mailing of the notice of deficiency" (26 U.S.C. 6512(b)(3)(B)). The Tax Court, and other courts as well, referred to the imputed refund claim under Section 6512(b)(3)(B) as a "deemed" refund claim in applying the limits set forth in Section 6511(b)(2). See, e.g., *Richards v. Commissioner*, 37 F.3d at 589; Pet. App. 40a. The court of appeals objected to this terminology, noting that Section 6512(b)(3)(B) does not actually use the word "deemed" (Pet. App. 9a).

The objection expressed by the court of appeals to use of the term "deemed" to refer to the statutorily imputed refund claim under Section 6512(b)(3)(B) is wholly semantical. As the Tax Court explained in its opinion in this case, "section 6512(b)(3)(B) directs us to make a determination *assuming that a claim for credit or refund was filed on * * * the date the notice of deficiency was mailed*" (Pet. App. 39a) (emphasis added). Nothing in the analysis applied by the Tax Court (or any other court) turns on the court's use of the term "deemed" as a short-hand reference to the statutorily imputed refund claim under Section 6512(b)(3)(B).

In criticizing the use of that terminology in this case, the court of appeals gave no explanation of what relevance, if any, it thought its objection would have to the correct interpretation of the statute. See Pet. App. 9a-10a. In fact, it has none. See, e.g., *Galuska v. Commissioner*, 5 F.3d at 196 ("Galuska agrees that under Section 6512(b)(3)(B) he is deemed to have filed a claim for refund of the alleged overpayment * * * when the Commissioner mailed him the notice of deficiency"); *Richards v. Commissioner*, 65 T.C.M. (CCH) 2137, 2138 (1993) (Section 6512(b)(3)(B) "tests the applicable limitations pe-

riod of section 6511 against a hypothetical claim for refund filed on the date the notice of deficiency was mailed"), aff'd, 37 F.3d 587 (10th Cir. 1994), petition for cert. pending, No. 94-1537.

b. Instead of squarely confronting the words of the statute, the court of appeals relied on what it perceived to be evidence in "the legislative history of § 6512 [that] indicates that Congress intended a taxpayer who filed a claim for refund within three years of filing a tax return to have a three-year refund period that runs from the date of the mailing of the notice of deficiency" (Pet. App. 17a). The extraordinarily sparse history cited by the court of appeals falls far short of supporting the court's speculations concerning legislative intent and, in any event, does not provide a basis for flouting the direct command of the plain language of Section 6512(b)(3)(B).

The sole statement of legislative history on which the court of appeals relied (Pet. App. 17a) is a single sentence contained in the voluminous House and Senate reports that were issued in connection with the enactment of the Internal Revenue Code of 1954. These reports simply state that Section 6512, as enacted at that time, contains "no material changes from existing law" (H.R. Rep. No. 1337, 83d Cong., 2d Sess. A415 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 586 (1954)).

The court of appeals recognized that "the language of § 6512 differed from the language in" the prior version of this statute, which was Section 322(d) of the 1942 Code (Pet. App. 16a). That Section had provided (Revenue Act of 1942, ch. 619, § 169(b), 56 Stat. 877-878):

No such credit or refund shall be made of any portion of the tax unless the Board [of Tax

Appeals] determines as part of its decision (1) that such portion was paid (A) within two years before the filing of the claim, the mailing of the notice of deficiency, or the execution of an agreement by both the Commissioner and the taxpayer * * * whichever is earliest, or (B) within three years before the filing of the claim, the mailing of the notice of deficiency, or the execution of the agreement, whichever is earliest, if the claim was filed, the notice of deficiency mailed, or the agreement executed within three years from the time the return was filed by the taxpayer.

Without undertaking a close analysis of the language of the 1942 provision, the court asserted that respondent would have prevailed under that statute. The court stated that "[t]he three-year refund period [under the 1942 Act] would have run from the date of the mailing of the notice of deficiency because it was earlier than the date of the filing of the claim for refund." (Pet. App. 16a). The court then reasoned that, because "no material change" was made in enacting the different language of the 1954 Code, the same result must have been "intended" by Congress under Section 6512(b)(3)(B) (Pet. App. 17a).

The reasoning of the court of appeals is faulty for several reasons. In the first place, the court erred in attempting to interpret the language of Section 6512(b)(3)(B) by ignoring the language of that statute and interpreting instead the markedly different language of a discarded provision of an outdated Code. This case concerns the language of Section 6512(b)(3)(B), not of some other provision of law. Cf. *Badaracco v. Commissioner*, 464 U.S. 386, 398 (1984) ("[t]he cases before us * * * concern the construction of existing statutes").

The court compounded its error by adopting an interpretation of the 1942 provision that was manifestly incorrect. The plain language of Section 322(d) of the 1942 Act provides that the three-year refund period was available in Tax Court (then the Board of Tax Appeals) only when the "earliest" of the refund claim, the notice of deficiency or an extension agreement occurred "within three years from the time the return was filed by the taxpayer" (Revenue Act of 1942, ch. 619, § 169(b), 56 Stat. 878). Accordingly, under both Section 6512(b)(3)(B) of the current Code and Section 322(d) of the 1942 Act, the three-year refund period is unavailable to the taxpayer who fails to file a return *before* the notice of deficiency is issued: "The ordinary understanding of the words 'from the time' implies that the taxpayer must file the return *prior to* filing the claim in order to benefit from the three-year refund period." *Richards v. Commissioner*, 37 F.3d at 589. See pages 18-19, *supra*.

The cursory statement in the 1954 committee reports—that the enactment of Section 6512 did not make any "material changes" in existing law—thus provides no support for the conclusion reached by the court of appeals in this case. The plain meaning of statutory text should not be disregarded in the absence of "clear evidence that reading the language literally would thwart the obvious purposes of the Act." *Mansell v. Mansell*, 490 U.S. 581, 592 (1989); accord *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98-99 (1991). Nothing in the history relied on by the court of appeals suggests that the literal application of the language of Section 6512(b)(3)(B) would defeat the obvious purpose of the statute.

c. The court of appeals recognized that the interpretation of Section 6512(b)(3)(B) applied by the

Tax Court in this case has a lengthy pedigree (Pet. App. 20a & n.11, citing a total of 25 consistent Tax Court decisions). The court of appeals suggested, however, that the administrative practice has not been consistent with that interpretation. Without offering any plausible foundation for its view,⁹ the court asserted (*id.* at 21a):

[T]he IRS, until 1992, had *always* treated § 6512(b)(3)(B) as providing a three-year refund period where the taxpayer filed a tax return and a claim for refund after the IRS mailed the notice of deficiency. Only recently has the IRS interpreted § 6512(b)(3)(B) to provide only a two-year refund period in a situation like Lundy's.

The court erred in its description of the applicable administrative practice. For at least twenty years, the Internal Revenue Service—like the Tax Court and five of the courts of appeals—has consistently interpreted Section 6512(b)(3)(B) to limit Tax Court refunds in cases of this type to the amount of taxes paid within the two-year period preceding the notice of deficiency. See, e.g., *Berry v. Commissioner*, 97

⁹ The only support that the court offered for its assertion that the IRS had only recently adopted the Tax Court's interpretation of Section 6512(b)(3)(B) was its statement that "[t]he IRS seemed ready to pay Lundy his refund prior to March 17, 1992, when the Commissioner moved to amend its answer and argued for the first time that the Tax Court did not have the authority to grant Lundy his refund" (Pet. App. 21a). Without offering any other basis for its understanding of administrative practice, the court offered the following speculation: "We suspect that the IRS's interpretation of § 6512(b)(3)(B) originated sometime in 1991 or 1992" (Pet. App. 21a).

T.C. 339, 344-345 (1991); *Hall v. Commissioner*, 58 T.C.M. (CCH) 879, 880 (1989); *White v. Commissioner*, 72 T.C. 1126, 1131 (1979) ("It is respondent's position * * * that any overpayment which may be determined * * * cannot be refunded or credited to petitioner due to restrictions contained in sections 6511 and 6512"); *Hosking v. Commissioner*, 62 T.C. 635, 642 (1974) ("Respondent contends that the record does not permit the finding necessary under section 6512(b)(2) to entitle petitioner to a refund."). That consistent administrative practice supports the interpretation of Section 6512(b)(3)(B) applied by the Tax Court in this case.

d. In concluding that respondent should be allowed to recover a refund of any overpayment made within the three-year period preceeding the issuance of the notice of deficiency, the court of appeals also relied on what it perceived to be the potential anomaly that "Lundy would have received his refund if he had filed his claim for refund in a United States district court or the United States Claims Court" (Pet. App. 10a). In making this assertion, the court assumed that a return filed by a taxpayer more than two years after the return was due would permit a subsequent refund claim to invoke the three-year refund period of Section 6511(b)(2)(A). That assumed result, of course, has no direct relevance to the proper interpretation of the plain language of Section 6512(b)(3)(B).¹⁰

¹⁰ Whether Lundy would have received his refund if the "circumstances had been different" (Pet. App. 11a) is irrelevant to interpreting the statute as it applies to the facts of this case. See *Richards v. Commissioner*, 37 F.3d at 591. Where the statute's language is plain, the "sole function of

Moreover, the court's assumption that the same taxpayer would fare differently in a refund suit in federal district court or the Court of Federal Claims than in the Tax Court has been squarely rejected by the Ninth Circuit in *Miller v. United States*, 38 F.3d 473 (1994). In *Miller*, the court held that, when a return is not filed within "two years after the payment of taxes," the taxpayer's claim for refund—whether brought in the Court of Federal Claims, federal district court or in the Tax Court—is barred by Section 6511(a).¹¹ See 38 F.3d at 476; see also *Rossman v. Commissioner*, 46 F.3d 1144 (9th Cir. 1995) (Table) (unpub.), petition for cert. pending, No. 94-1747. The court noted in *Miller* that 26 U.S.C. 6511(a) specifies that, to be timely, a refund claim must be filed (38 F.3d at 475):

within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within two years from the time the tax was paid.

the courts is to enforce it according to its terms." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

¹¹ Revenue Ruling 76-511, 1976-2 C.B. 428, assumes that, if (i) a return is filed more than two but less than three years after it is due and (ii) a refund claim is filed contemporaneously or subsequently, "the refund would [be] allowable since the overpayment would have been made within the 3-year period immediately preceding the filing of the claim." *Id.* at 429. That Ruling is inconsistent with the court of appeals' conclusion in *Miller*. See 38 F.3d at 475. For the reasons discussed in the text, however, the question whether *Miller* or Revenue Ruling 76-511 correctly interprets Section 6511(a) is not presented in this case and need not be resolved by the Court. See pages 31-33, *infra*.

The court concluded that an untimely return filed more than "2 years from the time the tax was paid" (26 U.S.C. 6511(a)) "cannot resurrect the three-year period" (38 F.3d at 475):

If the clock were to run only from the filing of the return, no claim would ever be barred as long as the return was not filed. * * * The point at which one must determine whether a return has or has not been filed, for purposes of [Section 6511(a)], must be two years after payment. Otherwise, no claim could ever finally be barred by the two-year-after-payment clause because the taxpayer could at any time file a return and have three more years to assert the claim.

See also *Oropallo v. United States*, 994 F.2d 25, 30 (1st Cir. 1993) ("We have assumed [for the sake of argument] that a return can be filed at any time after its due date and still be a return for purposes of filing a claim within that three-year period. Under that interpretation, the limitations period in section 6511(a) is totally illusory."), cert. denied, 114 S. Ct. 705 (1994).¹²

¹² The precise role intended for the last clause of Section 6511(a) has never been clearly stated by Congress. The phrasing of that Section first appeared in approximately its current form as Section 322(b)(1) of the Revenue Act of 1934, ch. 277, 48 Stat. 750. That Section provided (*ibid.*):

Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. If no return is filed by the taxpayer, then no credit or refund shall be allowed or made after

Even if—notwithstanding the reasoning of *Miller* and *Oropallo*—the language of Section 6512(b)(3) produces a difference in the treatment of taxpayers who seek a refund of their overpayment in the Tax Court and those who seek their refund in a district court or the Court of Federal Claims, it is not the function of this Court "to treat alike subjects that different congresses have chosen to treat differently."

two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

The history of the 1934 Act indicates that this Section sought to ensure that the taxpayer had no longer a period to seek a refund than was available for assessment. See S. Rep. No. 558, 73d Cong., 2d Sess. 44 (1934). That history does not indicate whether an untimely return would extend the time for filing a refund claim in situations where the tax had been paid more than two years previously.

The language of this provision was revised in 1954 and was revised again into its current form in 1958. The 1953 revision specified that the claim for refund could be filed within three years of when "the return was filed" (26 U.S.C. 6511(a) (1958)), as contrasted with the 1954 provisions under which the claim was required to be filed within three years "from the time the return was required to be filed (determined without regard to any extension)" (26 U.S.C. 6511(a) (Supp. II 1954)). As a concurrent change in the language of Section 6511(b) reflects, the purpose of the 1958 revision to Section 6511(a) was to allow the time for the filing of the *refund claim* to be expanded to include "the period of any extension for filing the return to which the claim relates" (H.R. Rep. No. 775, 85th Cong., 1st Sess. 102 (1957)). Accord S. Rep. No. 1983, 85th Cong., 2d Sess. 233-234 (1958). The histories of the 1954 and 1958 revisions do not discuss or explain the separate role intended for the last clause of Section 6511(a), which since 1934 has provided only a two-year period to file a claim for refund "if no return was filed" (26 U.S.C. 6511(a)).

West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. at 101. See *Richards v. Commissioner*, 37 F.3d at 591. There are numerous, significant differences between litigation in the Tax Court and in a district court. For example, (i) jury trials are allowed in a district court refund suit (28 U.S.C. 2402), but not in Tax Court suits (*Coleman v. Commissioner*, 791 F.2d 68, 71 (7th Cir. 1986)); (ii) in the Tax Court, but generally not in district court, the Commissioner may assert a deficiency greater than that determined in the notice of deficiency (26 U.S.C. 6214(a); see *Ferrill v. Commissioner*, 684 F.2d 261, 265 (3d Cir. 1982));¹³ and (iii) the Tax Court, unlike the district courts, "is a court of limited jurisdiction and lacks general equitable powers" (*Commissioner v. McCoy*, 484 U.S. at 7).¹⁴ The potential disparity in treatment of Tax Court and district court refund litigation, on which the court of appeals relied in this case, provides no basis for dis-

¹³ Because the limitations period on assessment is suspended during the pendency of a Tax Court proceeding (26 U.S.C. 6503(a)), any increased deficiency asserted by the Commissioner would not be barred by the statute of limitations. A refund suit, however, does not suspend the period of limitations on assessment and, therefore, the government generally would be barred by the statute of limitations from asserting new deficiencies in tax against the taxpayer in such a suit. See P. Junghans & J. Becker, *Federal Tax Litigation* ¶ 3.06, at 3-16 (2d ed. 1992).

¹⁴ Additional distinctions exist. For example, the right of a husband and wife who have filed separate returns for a particular year thereafter to elect to file a joint return for that year is terminated if either files a petition in Tax Court but not if either files a refund suit in district court. See 26 U.S.C. 6013(b) (2).

regarding the direct command of the specific language that Congress has employed.

It should not be forgotten that the solution to respondent's predicament was within his own grasp. Only taxpayers who file tax returns more than two years after they are due are affected by the decision in this case.¹⁵ A legislative determination that refunds should be restricted for such severely delinquent filers is not unduly harsh.¹⁶

¹⁵ If the notice of deficiency were issued in the first two years following the date on which the return was due, the taxpayer's payments during the tax year would be within the two-year refund period (under 26 U.S.C. 6511(b) (2) (B)) even if a return had not been filed. This is because withholding taxes and estimated tax payments made during the tax year are presumed to have been made on the date that the return was due. See 26 U.S.C. 6513(b) (1) and (2). If the taxpayer filed a timely return *before* the notice of deficiency, and the notice of deficiency were filed within three years from the filing of the return, the taxpayer would be entitled to recover overpayments made within the three-year period preceding the issuance of the notice under Section 6512(b) (3) (B). See 26 U.S.C. 6511(a), incorporated in 26 U.S.C. 6511(b) (2) (A), incorporated in 26 U.S.C. 6512(b) (3) (B). Taxpayers who file timely returns are thus protected because the notice of deficiency generally must be issued in time to permit assessment to occur "within 3 years after the return was filed" (26 U.S.C. 6501(a)). See note 3, *supra*.

¹⁶ Moreover, this Court has repeatedly held that courts are not authorized to rewrite a statute merely because they regard its effects as harsh or its operation to be "susceptible of improvement" (*Badarraco v. Commissioner*, 464 U.S. 386, 398 (1984)). See, e.g., *TVA v. Hill*, 437 U.S. 153, 194-195 (1978); *Lewyt Corp. v. Commissioner*, 349 U.S. 237, 240 (1955); *United States v. Olympic Radio & Television, Inc.*, 349 U.S. 232, 236 (1955). "Neither [this Court] nor the Commissioner may rewrite the statute simply because we may

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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feel that the scheme it creates could be improved upon."
United States v. Calamaro, 354 U.S. 351, 357 (1957).